IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION
and
POLK TANKER CORPORATION,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF RESPONDENTS ALASKA BULK CARRIERS, INC. AND TRINIDAD CORPORATION TO BRIEF FOR THE FEDERAL PARTIES

FRANCIS BALLARD
BALLARD, SPAHR,
ANDREWS & INGERSOLL
United Engineers Building
20th Floor
30 South 17th Street
Philadelphia, Penn. 19103
(215) 564-1800

ALAN G. CHOATE
PEPPER, HAMILTON
& SCHEETZ
123 South Broad Street
Philadelphia, Penn. 19109
(215) 893-3000

AMY LOESERMAN KLEIN
OLGA BOIKESS
WILLIAM KARAS
MORRIS GARFINKLE
GALLAND, KHARASCH,
CALKINS & SHORT
1054 Thirty-First Street, N.W
Washington, D.C. 20007
(202) 342-5200

Attorneys for
Alaska Bulk Carriers, Inc.
and
Trinidad Corporation.

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REPLY ARGUMENT

I. THE GOVERNMENT CLAIM THAT THE DECISION OF THE DISTRICT COURT LACKS FINALITY IS UNWARRANTED.

The Government claims that the November 30, 1977 order sustaining the agency's permanent waiver authority appealed from was not final and hence not appealable because the District Court, although entering final judgment and not retaining jurisdiction of the case, had ordered a remand to the agency for further consideration of

one issue relating only to the exercise of that authority for the STUYVESANT.[1] The claim that the November 30 order was not appealable is wholly lacking in merit. The complaint challenged the agency's action with respect to the STUYVESANT and sought declaratory and injunctive relief challenging the legality of agency grant of permanent waiver authority for any future CDS-built vessels. The issue of legality was finally decided by the district court; and the agency decision on remand, pertaining only to one facet of the waiver granted for the STUYVESANT, could not have affected the final judgment rendered on that claim. Moreover, the district court did not retain jurisdiction of the case, but entered an order granting final judgment as to all issues tendered to the court, notwithstanding the remand. Any issues involved in a review of the agency remand decision would thus be independent of the issues involved in the appeal.

There is no question here of "piecemeal litigation." Assuming, *arguendo*, that the November 30 order was not appealable, it became so, under the Government's position, when the agency issued its decision on remand even before the time for appeal of the November 30 order had expired. Thus, if there were any technical prematurity of the notice of appeal, such prematurity had no consequences in respect of the course of the litigation. Moreover, the order met the requirements for appealability under 28 U.S.C. §1292(b) and under §1292(a)(1). There is no reason to vacate the decision below when the effect would be a new appeal to the court of appeals raising precisely the issues decided by that court. Such an act would promote judicial waste, not judicial economy. The Government's failure to raise any question about "finality" until after the court of appeals decision was rendered adverse to the Government's position on the merits shows that the jurisdictional issue raised here is insubstantial.

[1]Brief for the Federal Parties (hereafter "Government Brief").

A. The Order Appealed From Is Final And Appealable

The complaint filed by Respondents Alaska Bulk Carriers ("ABC") and Trinidad Corporation ("Trinidad") requested injunctive relief halting permanent operation of the STUYVESANT in domestic trades, and declaratory and injunctive relief preventing future unlimited waivers for domestic operation of other vessels built with construction differential subsidy ("CDS"). Ruling on cross-motions for summary judgment, the trial court found that the agency had abused its discretion in the STUYVESANT case by failing to consider the competitive effects of the waiver. Although it remanded to permit the agency to consider these effects within 45 days, it declined to enjoin operation of the STUYVESANT in domestic trade and it did not retain jurisdiction of the case. (App. A at 94a-95a).

Since the requests for declaratory and injunctive relief preventing future waivers, i.e., waivers other than for the STUYVESANT, were based solely on a challenge to the agency's legal authority, the trial court's action was unquestionably complete when it granted summary judgment for petitioners and the agency on this issue. When, on November 30, 1979, it subsequently granted respondent's motion for entry of final judgment (R. 53), an appealable order issued within the ambit of 28 U.S.C. 1291 and Fed. R. Civ. P. 54(b)[2]. The Government admits that a Rule 54(b) certification was made but contends that Rule 54(b), which allows a court to enter an appealable final judgment as to one or more but fewer than all of the claims or parties, was not satisfied by the trial court's November 30, 1977 order. It alleges that no party's claims were completely determined nor was any single claim of any party finally decided (Government Brief, p. 10, fn. 12). This argument ignores the claims against future permanent waivers which were completely resolved.[3]

[2]A copy of the Order is Exhibit I to this Reply.

[3]Respondents' claims were not limited as those in Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737, 743 (1976) to a single legal right

Furthermore, with its November 30, 1977 order, the trial court entered final judgment as to all issues including the issue remanded. It did not retain jurisdiction of the case after remand.[4] Accordingly, the decision was appealable notwithstanding the remand.[5]

The issues presented for appeal could not have been changed or mooted by the agency action on remand which was confined to the narrow issue of competitive effects. Even if the agency has changed its mind about the STUYVESANT, its action would not have changed or mooted the issue of the agency's legal authority which was

growing out of a single set of facts. They were directed both to the agency's action with respect to the STUYVESANT and to the separately raised issue of the agency's right to issue any future permanent waivers.

[4]The order effectively ended the litigation on the merits leaving nothing further for the court to do. Catlin v. United States, 324 U.S. 229, 233 (1945). Moreover, even if the order was not "the last order possible to be made in a case," it may be final depending on its character and effect. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-54 (1964) discussed infra at p. 6.

[5]The Government states that remand orders are not "generally" final (Government Brief, p. 10). But in the cases on which it relies, there are circumstances other than the remand which indicate a lack of finality. In Bohms v. Gardner, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968) the district court expressly declined to find the order appealable, and in Bachowski v. Usery, 545 F.2d 363 (3rd Cir. 1976) there was no certification made by the district court. In Pauls v. Secretary of the Air Force, 457 F.2d 294 (1st Cir. 1972) the court retained jurisdiction for review of the agency determination. Freeman v. Califano, 574 F.2d 264, 268 (5th Cir. 1978) was not treated as a remand case but one "controlled" by the rule that a finding of liability is not final where damages are to be measured before judgment is entered. In cases lacking such circumstances, decisions involving remands are appealable. See Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1975); Citizens to Preserve Overton Park, Inc. v. Brinegar, 494 F.2d 1212 (6th Cir.), cert. denied, 421 U.S. 991 (1974); Wells v. Southern Airways, Inc., 517 F.2d 132 (5th Cir.), cert. denied, 425 U.S. 914 (1975); Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969), rev'd on other grounds sub nom., Richardson v. Perales, 402 U.S. 389 (1971).

the focus of the appeal. In any event, the issues on appeal were not mooted; the agency reaffirmed its views on remand.

Likewise, there is no issue of piecemeal appeals. The remand decison was completed on January 6, 1978 (Jt. App. at 590) before the period for filing appeals from the November 30, 1977 order had expired.[6] The Government's discussion of the possibilities of piecemeal litigation is purely theoretical.[7] There is no litigation testing the remand order pending nor is any likely since the court of appeals decision effectively disposed of the case.[8] Furthermore, any issues involved in a review of the remand order would be independent of the issues involved in this appeal and thus properly subject to separate consideration.[9]

[6]All parties appealed. Respondents filed notice of appeal on November 30, 1977 (C.A. No. 77-1647, R. 54); Shell filed its notice on December 29, 1977 (C.A. No. 77-1645, R. 66). Petitioner *and the Government* filed notices of appeal on January 30, 1978 (C.A. No. 77-1645, R. 68 and 69).

[7]The only issue which the Government identified for consideration in a district court reviewing the remand decision is the standing of plaintiffs to bring this suit. This issue was fully litigated before the trial court (Defendant's Memorandum in Support of Motion to Dissolve Temporary Restraining Order and to Dismiss, R. 14, pp. 17-20) and before the court of appeals by petitioners (See Brief of Appellees-Cross Appellants Seatrain and Polk pp. 49-57). The Government dropped its cross-appeal raising this issue (Motion to Dismiss, 3/20/78, and Order, 5/5/78, C.A.D.C. No. 78-1216; C.A. No. 77-1645, 5/8/78). Its attempt to resurrect the claim now cannot be made in the name of administrative regularity and judicial economy.

[8]The court of appeals recognized that the district court had decided other issues, such as those necessitating the remand, but found it unnecessary to reach these issues because of its determination that the agency lacked any permanent waiver authority (App. A at 12a, fn. 22).

[9]Under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) an appeal is permitted where the order is collateral to the main decision. Here the opposite situation occurs; the remand order raises the collateral issue. Nevertheless, Cohen demonstrates the separate appealability of the remand case since a determination of whether the

It is difficult to understand how considerations of judicial economy could be furthered by requiring the parties to begin anew in the district court to secure a determination of the same legal questions already decided by the court of appeals by seeking review of the remand decision in a separate action, or not seeking such review, and merely appealing once again from the district court judgment upholding the agency's permanent waiver authority. If review of the issues decided on remand was sought in the district court, the likelihood is that a similar decision resting on the issue of legal authority to grant permanent waivers (without reaching issues presented by the remand) would be presented to the court of appeals and again to this Court since any district court decision can be expected to follow the vacated court of appeals determination.

This Court has not interpreted the finality doctrine so as to require unnecessary litigation. It has called for a practical approach balancing any inconvenience and costs of piecemeal review against the danger of denying justice by delay. *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148, 152-53 (1964). Here any danger of piecemeal litigation is highly remote, while the needs of the parties, particularly respondents and Shell, for a prompt decision has been repeatedly acknowledged.[10] This Court has

agency adequately assessed the competitive effects of a particular proposed waiver is not inextricably intertwined with a determination of the agency's power to grant such waivers under any circumstances. See also Radio Station WOW v. Johnson, 326 U.S. 120, 126 (1945) where an appeal was proper if the concluded adjudication raises issues which are "independent of, and unaffected by, another litigation with which it happens to be entangled."

[10]Proceedings in the trial court were expedited and a final judgment entered to facilitate a speedy decision on the basic legal issues (Transcript of Hearing, September 30, 1977, at 9:00 a.m., p. 9; App. A at 94a). The stay of mandate ordered by the court of appeals was limited in time to permit this Court to consider the petition this term because Shell's and respondents' vessels will soon be available for rechartering (R. 21, p. 1; Memorandum of Shell Oil Company in Opposition to Motion for Stay of Mandate Pending Application for Writ of Certiorari, 4/4/79, p. 1).

recognized that judicial economy is not achieved by sending a case back with an important issue left undecided, particularly where the question of appealability is raised for the first time before this Court.[11]

B. The Appeal Was Proper Even If The Order Was Not Final.

The Government position is based upon a meaningless technicality for, assuming that the judgment of November 30, 1977 was not final, it *became final* when the agency decision on remand was issued on January 6, 1978 reaffirming its prior action. At that point, respondents could have filed a notice of appeal, and the Government position means that such a notice would have been proper. The courts hold that an appeal should not be dismissed because it was technically premature if in fact an appealable judgment was rendered below, the appellant clearly manifested his intent to appeal, and the prevailing party can show no prejudice resulting from prematurity of the notice.[12]

The Government recognizes that the court of appeals could have had jurisdiction over the appeal under 28 U.S.C.

[11]Coopers & Lybrand v. Livesay, 437 U.S. 473, 98 S.Ct. 2454, 2462 fn. 30, discussing Gillespie v. United States Steel Corporation. The government first raised the issue in its petition for rehearing before the court of appeals (pg. 12, fn. 4).

[12]Richerson v. Jones, 551 F.2d 918, 922-23 (3rd Cir. 1977) applied these principles to a case where, as here, final action unquestionably occurred prior to the appeal. Richerson distinguished Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976) (cited to support Government assertions that appeal "defects" are not correctable, Government Brief, p. 12, fn. 15) because in Liberty Mutual "the court at no time had a final order before it." Morris v. Uhl & Lopez Engineers, Inc., 442 F.2d 1247, 1250-51 (10th Cir. 1971); Hodge v. Hodge, 507 F.2d 87, 89 (3rd Cir. 1977); Stokes v. Peyton's, Inc., 508 F.2d 1287 (5th Cir. 1975); Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971). See Foman v. Davis, 371 U.S. 178, 181 (1962); 9 Moore's, Federal Practice § 204.14, at 983 (2d ed. 1975).

§1292(b), but it asserts that the requirements of certification by the district court and a request to the court of appeals to permit the appeal were not met (Government Brief, p. 12). Since the courts permit substantial compliance with these technicalities, the district court findings made in its November 30, 1977 order together with respondents' action in filing a notice of appeal within ten days of the order satisfy § 1292(b) requirements.[13]

This Court has acknowledged that an order which is not appealable as a final order under section 1291 may be appealable under §1292(a)(1) if the person seeking review in the court of appeals were denied injunctive relief. *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744-745 (1976). Respondents were denied injunctive relief halting operation of the STUYVESANT in domestic trades and preventing future waivers. If the court's decision is considered interlocutory, not final, for purposes of appellate review, jurisdiction lies under section 1292(a)(1). *Ackerman-Chillingworth* v. *Pacific Electrical Contractors Association*, 579 F.2d 484, 489 (9th Cir. 1978), *cert denied*, 439 U.S.____, 99 S.Ct. 872 (1979); *Paceo, Inc.* v. *Applied Moldings, Inc.*, 562 F.2d 870, 878-80 (3rd Cir. 1977); *McGill* v. *Parsons*, 532 F.2d 484, 485 fn. 1 (5th Cir. 1976);

[13]Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737, 745 (1976) concedes that the "District Court's findings made with a view to satisfying Rule 54(b) might be viewed as substantial compliance with the certification requirement" of section 1292(b). There, the Court was unwilling to assume that the court of appeals would have exercised its discretion to hear an interlocutory appeal. In this case the court of appeals specifically acknowledged the remand decision and recognized that its decision eliminated any need to resolve further issues in the case. Under these circumstances, it is appropriate to apply Reconstruction Finance Corp. v. Prudence S.A. Group, 311 U.S. 579, 582 (1941) holding that the filing of a notice of appeal satisfies requirements that petitioners seek allowance of an appeal in the discretion of the circuit court of appeals. Since the defect is not jurisdictional, the courts have the power "to disregard such an irregularity in the interest of substantial justice."

Equal Employment Opportunity Commission v. *International Longshoremen's Association*, 511 F.2d 273, 276-77 (5th Cir.), *cert. denied*, 425 U.S. 994 (1975); *Melendes* v. *Singer-Friden Corporation*, 529 F.2d 321 (10th Cir. 1976) (availability of injunctive relief curtailed).

C. Vacating The Court Of Appeals Decision Does Not Promote Judicial Economy.

The ostensible objective of the Government's request that the Court summarily vacate the judgment is to ensure that the formalities of the appeals process be observed in every case. Such observance is an empty formality in this case since the district court intended that its decision be final, and any further district court proceedings would merely track the vacated court of appeals decision. Any premature appeal was remedied when the agency issued its decision on remand on January 6, 1979 which, according to the Government position, then made the November 30 order appealable. Judicial economy is not served by the requested action vitiating the hard work of a busy panel of judges. Nor is it consonant with those goals to permit the Government to seek and prosecute appellate review and question the procedural "defect" only after an unfavorable decision is made.

II. THERE IS NO REASON TO DISTURB THE COURT OF APPEALS DECISION ON THE MERITS.

To support its claim that the court of appeals decision raises an issue requiring this Court's attention, the Government points to the STUYVESANT's singular predicament. The prospect that this American vessel may not be employed does not signal a need for increased agency powers.[14]

[14]The STUYVESANT has employment in the Alaskan trade only through 1980 and might become idle at that time without regard to the court of appeals decision (R. 13, p. 4).

The agency has sufficient existing flexibility under section 506 to insure that Alaskan oil does not "[remain] . . . in the pipeline" because of any shortfall of tonnage.[15] The agency's response to a recent application for a section 506 waiver for operation of a subsidized vessel of comparable tonnage to the STUYVESANT in the Alaskan oil trade was to deny the request, finding that there were suitable unsubsidized vessels available.[16]

Nor is there any prospect that the nation's shipbuilding program will be undermined. On the contrary, as the court of appeals carefully explained, the decision confirming the ban against permanent operation of CDS vessels in domestic trade will permit the economic forecasting needed to stimulate private shipbuilding efforts.

The Government's suggestion that the CDS program will be weakened if waivers are not permitted is absurd. The CDS program was enacted in 1936, yet this is the first time the agency has attempted to go beyond six-month temporary waivers. In doing so, the agency explained that it was motivated by unusual circumstances and it is not expected to be a precedent for other vessels to operate in the Alaskan oil trade.[17]

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[15]Brief for the Federal Parties, p. 9, fn. 11. No reference to the record is given for statements alleging (1) that oil remains in the pipeline because ships are unavailable, (2) a causal relationship between the layup of the STUYVESANT and the closing of its shipyard. Similarly, there is no basis for any claim by Amicus Curiae Sohio Natural Resources Company that the decision below results in any inability to secure transportation for Alaskan oil.

The Seatrain Shipyard announced it was closing due to perpetual losses. Brief of Shell Oil Co. in Opposition, p. 11. The agency itself conceded that it was impossible to predict supply and demand of tankers in the Alaskan oil trade beyond 1980 (App. A at 18a, fn. 34) thus making it impossible to show a long-term need for the STUYVESANT in the trade.

[16]Boston VLCC Tankers, Inc. VI, Maritime Administration Docket No. S-636, 19 S.R.R. (Pike & Fischer) 43 (M.A., 1979).

[17]Final Opinion and Order on Remand for Reconsideration, p. 35 (Jt. App. at 627).

In its brief before this Court, the Government relies on a wholly incorrect factual premise — that the subsidy paid the STUYVESANT was fully repaid.[18] The fact is that the agency accepted a promissory note for repayment over twenty years so the STUYVESANT has *not* "disgorged its entire CDS", nor, as the court of appeals explained, is the market situation the same "as if they had built the STUYVESANT without a CDS."[19]

The court of appeals has painstakingly and correctly answered every argument suggested by petitioners and the Government on the merits. There is no reason to discard or disturb its decision. The petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS BALLARD
BALLARD, SPAHR,
ANDREWS & INGERSOLL
United Engineers Building
20th Floor
30 South 17th Street
Philadelphia, Penn. 19103

ALAN G. CHOATE
PEPPER, HAMILTON
& SCHEETZ
123 South Broad Street
Philadelphia, Penn. 19109

AMY LOESERMAN KLEIN
OLGA BOIKESS
WILLIAM KARAS
MORRIS GARFINKLE
GALLAND, KHARASCH,
CALKINS & SHORT
1054 Thirty-First Street, N.W
Washington, D.C. 20007

Attorneys for
Alaska Bulk Carriers, Inc.
and Trinidad Corporation.

June 7, 1979

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[18]Government Brief, pp. 2, 13, 14.

[19]Id. at p. 14.

[EXHIBIT 1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELL OIL COMPANY, Plaintiff,	:	
	:	Civil
v.	:	Action No. 77-1645
JUANITA M. KREPS, et al., Defendants.	:	
ALASKA BULK CARRIERS, INC., and TRINIDAD CORPORATION, Plaintiffs,	:	
	:	Civil
v.	:	Action No. 77-1647
JUANITA M. KREPS, et al., Defendants.	:	

ORDER

Upon consideration of the motion of plaintiffs Alaska Bulk Carriers, Inc. and Trinidad Corporation to amend this Court's order of November 22, 1977, which plaintiff Shell Oil Company joined in today at the status call held herein, and it appearing to the Court that all plaintiffs seek leave to dismiss from this case the claim remaining before the Court that the Secretary's decisions with respect to the STUYVESANT were arbitrary, capricious, and an abuse of discretion because the operative decisions were made in 1975 and kept secret until 1977, and it appearing to the Court that this remaining claim is superfluous and would

afford plaintiffs no greater relief than the remand which has already been ordered by this Court, and it further appearing that no further issues remain before the Court and that there is no need for any further proceedings in this case at this time, and it further appearing that there is no reason to delay the entry of final judgment herein, it is, by the Court, this 30th day of November, 1977,

ORDERED, that plaintiffs' motion to amend this Court's Order of November 22, 1977, be, and the same hereby is, granted; and it is

FURTHER ORDERED, that plaintiffs' remaining claim be, and the same hereby is, dismissed; and it is

FURTHER ORDERED, that final judgment be, and the same hereby is, entered with respect to all claims decided by the Court in its Order and Memorandum Opinion of November 22, 1977.

/s/ Charles R. Richey
Charles R. Richey
United States District Judge

[Filed November 30, 1977]